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No. 90-1598

IN THE

# Supreme Court of the United States

October Term 1990

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LAWRENCE J. KORB,

*Petitioner,*

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT,

*Respondents.*

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## PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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## QUESTION PRESENTED

Is a private individual's First Amendment right to be free of official retaliation for criticizing the government a "clearly established" right such that government officials are not entitled to immunity from suit for violations of such right?

## LIST OF PARTIES

In addition to the parties appearing in the caption, Carl Smith was a defendant in the proceedings below in the United States District Court for the Eastern District of Virginia. On appeal before the United States Court of Appeals for the Fourth Circuit, upon joint motion of plaintiff-petitioner Lawrence Korb and Mr. Smith, the action against Mr. Smith was dismissed.

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No. 90 -

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term 1990

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LAWRENCE J. KORB,

Petitioner,

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT,

Respondents.

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

Petitioner Lawrence J. Korb respectfully requests that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit on November 26, 1990, as amended December 6, 1990, and January 9, 1991.

## OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Eastern District of Virginia granting defendants' motion to dismiss and for summary judgment was issued on July 19, 1988. It is reproduced in the Appendix at 29a through 55a.

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the district court on the grounds that the defendants were entitled to qualified immunity was issued on November 26, 1990, and is reported at 919 F.2d 243 (4th Cir. 1990). It is reproduced in the Appendix at 1a through 24a. Orders amending the Fourth Circuit opinion were entered on December 6, 1990, and January 9, 1991. They are

reproduced in the Appendix respectively at 25a through 26a, and 27a through 28a.

## JURISDICTION

The opinion of the Court of Appeals was issued on November 26, 1990, and amended on December 6, 1990 and January 9, 1991. By orders entered February 15, 1991 and April 15, 1991, Chief Justice Rehnquist has extended the time for filing this petition up to and including April 15, 1991.

The Court has jurisdiction to review the judgment of the lower court pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United

States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## STATEMENT OF THE CASE

### A. Factual Background

Petitioner Lawrence Korb served as President Reagan's Assistant Secretary of Defense (Manpower, Installations and Logistics) from 1981 to 1985. In September 1985, Korb resigned his position as Assistant Secretary of Defense and was hired by the Raytheon Company ("Raytheon"). Raytheon was and is a major defense contractor whose primary source of revenues and profits is the United States Department of Defense. Korb served as Vice President in charge of Raytheon's "Washington, D.C." office,

and was responsible for Congressional relations and liaison with various government departments, including the Department of Defense. 57a-58a.[1/]

In December 1985, Korb joined the Committee for National Security ("CNS") in his private capacity, but with the permission of Raytheon. CNS is a Washington-based, nonprofit, bipartisan organization whose members include former Defense Department officials and retired military officers. The goal of CNS is to encourage informed public debate on national security issues and to expand the constituency for policies and programs designed to advance national security while reducing the risk of

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1/ This factual recitation is based on the allegations of petitioner's amended complaint which must be accepted as true on a motion to dismiss. Kugler v. Helfant, 421 U.S. 117, 125-26 n.5 (1975).

nuclear war. For some years, CNS has published an annual alternative defense budget as one of its educational activities. 59a.

On February 25, 1986, Korb participated in a CNS press conference to announce the publication of CNS's alternative defense budget for the upcoming fiscal year. A report of the press conference appeared in the next day's Washington Post, which prominently featured Korb's role as a former Defense Department official who was now critical of proposed defense spending. The Post article stated that during the press conference Korb had urged a scaling back of the planned 600-ship, 15 carrier-group Navy that was supported by respondent John F. Lehman, then Secretary of the Navy. 58a-60a.

After reading the newspaper account of the CNS press conference, Secretary Lehman told his staff at the Pentagon that he strongly objected to Korb criticizing the Administration's proposed defense budget. That same day, with the approval of Secretary Lehman, the two officials then in charge of dispensing Navy contracts, respondent Everett Pyatt, then Assistant Secretary of the Navy (Shipbuilding and Logistics), and respondent Melvyn Paisley, then Assistant Secretary of the Navy (Research, Engineering & Systems), each telephoned high-ranking Raytheon executives. During these separate phone conversations, both Pyatt and Paisley expressed their anger at Korb's statements during the CNS press conference. 58a-61a. Pyatt and Paisley warned the Raytheon executives that Raytheon's future business dealings with

the Pentagon could be harmed by Korb's presence and demanded that Raytheon prevent Korb from criticizing the Administration's proposed defense budget. 61a. In addition, respondent Pyatt told a Raytheon executive that he would stop assisting Raytheon with certain defense contracts unless Raytheon dealt with Korb's outspokenness. Id. As a result of these explicit and implicit threats by respondents, Raytheon terminated Korb from his position. 62a.

After respondents learned that Korb had been fired in response to their telephone calls, they again contacted Raytheon. They reiterated that they wanted Korb silenced but suggested that Raytheon do so by means other than an outright dismissal. On March 19, 1986, respondent Pyatt wrote to Raytheon that "[t]he Navy objects strongly to officers

of our contractors whose salaries are paid in part by the Department of Defense, speaking as company officers, attacking President Reagan's Defense program." 62a-63a. On or about March 25, 1986, respondent Lehman telephoned the president of Raytheon and advised him to transfer Korb to another job, out of town. 63a-64a. In explaining his actions, respondent Lehman later publicly declared "I had every hope Raytheon would tell him to shut up and stop testifying against its principal customer." 64a.

On or about March 27, 1986, in response to Secretary Lehman's suggestion to Raytheon's president, Raytheon offered Korb the option of being assigned as a commercial marketing consultant to a Raytheon subsidiary in Philadelphia, Pennsylvania in lieu of dismissal from the company. This transfer would have

been a demotion for Korb and would have prevented him from speaking out on important matters of national concern. For these reasons, Korb refused to accept this alternative position, and Raytheon thereupon ended his employment. 64a-65a.

Thereafter, at the request of several members of Congress, the Office of the Inspector General of the Department of Defense conducted an investigation into respondents' conduct. The Report of Investigation, dated October 28, 1986, concluded that these "Navy officials acted improperly in that they complained to Raytheon with the intention of restricting Dr. Korb from making public statements that were contrary to Department of the Navy and the DoD positions .... The Navy officials demonstrated a lack of sensitivity to the right of persons to speak out on public

issues and to the responsibility of Government officials not to abuse their office by impinging on those rights .... The fundamental concept that Defense officials do not impinge on the right of private persons, including executives of Defense contractors, from expressing their opinions on matters of public policy, is ... self-evident." 65a-66a.

In conclusion, the Office of the Inspector General recommended, among other things, that the Secretary of Defense "remind" Defense Department officials of the "prohibition" against taking action to restrict the free speech rights of non-Defense Department personnel. The Inspector General's office further recommended that the Secretary of Defense issue disciplinary letters to respondents "concerning the impropriety of their actions and ...

their continuing belief that contractor executives lose the right to speak out on Defense policy issues if their views differ from those of the Navy." 67a.

B. Proceedings Below

On July 19, 1988, the district court dismissed all of petitioner's claims against respondents and granted respondents' motion to dismiss for failure to state a claim or in the alternative for summary judgment after denying petitioner all opportunity for discovery.[2/] 54a. The court dismissed

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[2/] Before respondents answered any of petitioner's outstanding discovery requests, the district court granted respondents' motion for a stay of all discovery "pending final determination of whether defendants enjoy qualified immunity from suit and liability in this matter." Petitioner opposed the summary judgment motion on the grounds that there were material factual disputes and that he had been wrongfully denied all opportunity for discovery.

the action on the alternative grounds that respondents' actions had not caused petitioner's harm and, if they had, respondents were nonetheless entitled to qualified immunity from petitioner's claims. The district court's ruling did not distinguish between the legal standards applicable to a motion to dismiss and to a motion for summary judgment. Petitioner appealed.

On November 26, 1990, a majority of the Fourth Circuit panel affirmed the district court, holding that respondents are entitled to qualified immunity. Judge Sprouse dissented on the grounds "that defendants are not entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 and Anderson v.

Creighton, 483 U.S. 635." 23a-24a.[3/]

The majority granted qualified immunity on the grounds that the law was not clearly established in 1986, that "[government] officials may not seek to retaliate against a private employee through his private employer solely for his exercising his First Amendment rights," because earlier cases involving government retaliation for the exercise of First Amendment rights involved public

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3/ The court did not reach the causation issue. 14a. It affirmed the dismissal on qualified immunity grounds pursuant to Fed.R.Civ.P. 12(b)(6). 12a. The court did not address the determinations that would be required to enter summary judgment on the issue: whether there are material factual disputes and whether plaintiff was afforded the required opportunity for discovery. 12a-14a. See Anderson v. Creighton, 483 U.S. at 646 n.6 (if actions respondent claims are different than those that petitioner alleges, discovery may be necessary before a motion for summary judgment can be resolved).

employees. 20a-22a. Since Korb was a private employee, the majority held that a reasonable official could not have known that government retaliation in response to his speech would violate the First Amendment.

In its opinion as originally issued, the court stated that "We [now] deem it to be the law" that government officials may not retaliate against private employees for exercising First Amendment rights. 22a. Subsequently, however, the court amended its opinion to delete the statement "We deem it to be the law" and replaced it with the phrase "Even if it ought to be the law" (emphasis in original). 27a-28a.

## REASONS FOR GRANTING THE WRIT

This case raises issues of national significance that merit plenary review by this Court. Whether private individuals have a "clearly established" right to be free of official retaliation for criticizing the government, which entitles them to a remedy against officials who violate that right, is an important question that should be settled by this Court.

The decision below granting respondents qualified immunity on the grounds that this First Amendment right is not clearly established conflicts with both this Court's free speech jurisprudence and this Court's decisions concerning qualified immunity. Anderson v. Creighton, 483 U.S. 635, 645 (1987);

Harlow v. Fitzgerald, 457 U.S. 800, 806-07, 818 (1982). The decision below also reflects an ongoing confusion in the lower courts about the proper scope of qualified immunity.

In addition, the Fourth Circuit's explicit failure to rule that petitioner's First Amendment rights were violated has the effect of immunizing future violations of the First Amendment that, in the absence of the Fourth Circuit's opinion, would have been remediable. Because of the way the qualified immunity doctrine operates, the Fourth Circuit's decision has this effect even though it wrongly decided that petitioner's First Amendment right was not clearly established. The immunity defense denies recovery for constitutional violations when public officials can point to ambiguity in the

law concerning whether their actions were illegal and the Fourth Circuit opinion now constitutes such ambiguity. If the opinion is permitted to stand, future constitutional violations of this type will be perpetually immunized.

**THE FOURTH CIRCUIT'S HOLDING THAT PRIVATE INDIVIDUALS HAVE NO CLEARLY ESTABLISHED RIGHT TO BE FREE OF OFFICIAL RETALIATION FOR CRITICIZING THE GOVERNMENT ERODES ONE OF THE BASIC GUARANTEES OF OUR DEMOCRATIC SOCIETY.**

Petitioner's complaint alleges that after he publicly criticized the proposed Defense Department budget respondent Navy officials pressured his employer, a Navy contractor, to make sure that he would not speak on the subject again. As a result, petitioner lost his job. Petitioner was thus directly and severely penalized by the government for the exercise of his First Amendment rights.

This Court has repeatedly made clear that such official retaliation directed at speech on a matter of public concern violates the First Amendment unless there is a compelling governmental justification for such action unrelated to the speech. First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978). See Rankin v. McPherson, 483 U.S. 378 (1987); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 414-16 (1979); Mt. Healthy City Sch. Bd. of Ed. v. Doyle, 429 U.S. 274, 283-84 (1977); Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95-96, 99 (1972); Pickering v. Board of Ed., 391 U.S. 563, 573-75 (1968); Mills v. Alabama, 384 U.S. 214, 218-20 (1966); New York Times v. Sullivan, 376 U.S. 254 (1964); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Thornhill v. Alabama, 310 U.S. 88, 101-05

(1940). See also Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984); Benson v. Scott, 734 F.2d 1181, 1186 (7th Cir.) cert. denied, 469 U.S. 1019 (1984); Fujiwara v. Clark, 703 F.2d 357 (9th Cir. 1983).[4/]

Accordingly, a private individual's First Amendment right to be free of official retaliation for speaking out on matters of public concern is not only fundamental, it is a clearly established right as that term is used in Harlow and Anderson v. Creighton. The Defense Department's own Inspector General described as "self-evident" the proposition that government officials may not use government influence and power to

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4/ See generally Tribe, American Constitutional Law 789-804 (1988). "Any adverse governmental action aimed at communicative impact is presumptively at odds with the first amendment." Id. at 790.

punish a person for expressing political views.[5/] No government official in 1986 could have reasonably believed anything different.

The Fourth Circuit's holding to the contrary misapplies the basic teachings of the First Amendment and is in direct conflict with this Court's decisions. If the Fourth Circuit were correct that the

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5/ The Report of Investigation by the Office of the Inspector General of the Department of Defense is excerpted in the Amended Complaint at 65a-67a.

This precept was also recognized as fundamental by members of Congress. As Senator Nunn observed in referring to Korb's situation: "I felt strongly, and I think a lot of other people do, Senator Warner said he did, that when an individual is no longer with the Government and he is basically run out of a private enterprise job by governmental officials with a threat of retaliation against the private employer, it seems to me that his rights as a citizen have been at least put in jeopardy." Nat. Security Strategy: Hearings Before the Comm. on Armed Services, S. Hrg. 100-257, Jan. 20, 1987, at 386.

First Amendment right asserted by petitioner is not clearly established despite its core nature and the precedents from this Court, then the doctrine of qualified immunity would in effect eviscerate the right to a meaningful remedy for all First Amendment violations except when precisely the same factual circumstances have previously been adjudicated. Petitioner respectfully submits, therefore, that the Court should grant certiorari in order to preserve what all agree is a central protection of the First Amendment: namely, the right to criticize the government and its officials without fear of retaliation. See New York Times v. Sullivan, 376 U.S. 254, 269-71 (1964).

In failing to recognize that petitioner's First Amendment claim rested on clearly established law, the Fourth

Circuit's holding also misconstrues and misapplies this Court's decisions concerning the defense of qualified immunity. Those decisions clearly reject the claim that a qualified immunity defense is appropriate in constitutional cases unless "the very action in question has previously been held unlawful." Anderson v. Creighton, 483 U.S. at 640. The unlawfulness must merely be apparent in the light of pre-existing law. Id. And the determination of the existence of "clearly established law" depends "upon the level of generality at which the relevant 'legal rule' is to be identified." Id. at 639.

Here the Fourth Circuit erred in holding that the law was not clearly established because it articulated the relevant legal right too narrowly. While recognizing that "the Supreme Court has

held that government officials may not retaliate against public employees for speaking on matters of public concern," 20a, the Fourth Circuit held that the law was not clearly established that government "officials may not seek to retaliate against a private employee through his private employer solely for his exercising his First Amendment rights". 22a. By insisting that in the context of petitioner's claim, there be previous case law specifically prohibiting retaliation through a private employer, the Fourth Circuit demanded a closer factual nexus with pre-existing free speech cases than this Court's

decisions have ever required.[6/] See 483 U.S. at 640. See also Andrews v. Philadelphia, 895 F.2d 1469, 1479-80 (3rd

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[6/] The Fourth Circuit never explains why the First Amendment protection for public employees does not also apply a fortiori to private employees. The fact that the petitioner is a private individual and not a public employee makes his First Amendment claim stronger, not weaker, because there is no countervailing governmental interest as employer in promoting the efficiency of the service it performs. See Benson v. Allphin, 786 F.2d 268, 278-79 (7th Cir.), cert. denied, 479 U.S. 848 (1986).

In addition, the district court decision in Donohoe v. Watt, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983) does not support the Fourth Circuit's conclusion that these First Amendment rights of private employees were not clearly established in 1986. See 18a-19a. That case held only that government officials may transmit information concerning a private individual to that individual's employer without infringing any right of privacy. The Fourth Circuit does not address the applicable precedent recognizing private individuals' First Amendment rights to be free from government retaliation. See, e.g., Benson v. Allphin, 786 F.2d at 278; Reuber v. United States, 750 F.2d 1039, 1063 (D.C. Cir. 1984) (Bork, J., concurring).

Cir. 1990) (even though no case directly on point, the general right was established); Alexander v. Perrill, 916 F.2d 1392, 1397-8 (9th Cir. 1990) (to defeat qualified immunity no prior case with the exact factual situation required).

The Fourth Circuit's misunderstanding of the specificity required for First Amendment rights to be clearly established in the context of a private individual's right to be free of official retaliation is shared by other courts. See e.g., Rakovich v. Wade, 850 F.2d 1180, 1211-14, 1216-17 (7th Cir.) cert.

denied, 488 U.S. 968 (1988).[7] It also reflects a more general confusion in the lower courts concerning the meaning of "clearly established".[8] This Court

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[7] Compare Dube v. State University of New York, 900 F.2d 587 (2nd Cir. 1990); Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990); Burgess v. Pierce County, 918 F.2d 104 (9th Cir. 1990); Stewart v. Baldwin County, 908 F.2d 1499 (11th Cir. 1990); Roth v. Veteran's Admin., 856 F.2d 1401 (9th Cir. 1988); (all denying qualified immunity in the absence of case law directly on point) and Melton v. City of Oklahoma, 879 F.2d 706 (10th Cir. 1989).

[8] Cleveland-Perdue v. Burtsche, 881 F.2d 427 (7th Cir. 1989) cert. denied, 111 S.Ct. 368 (1990)(what is clearly established has not been addressed by the Supreme Court); Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988) (same).

should clarify this important issue in this First Amendment context.[9/]

Finally, unless this Court issues a writ, the existence of the Fourth Circuit opinion will immunize future constitutional violations that would otherwise be remediable. The opinion reflects what has become a prevalent practice in the lower courts: ruling on the qualified immunity issue without ruling on the existence of the right at issue. In its opinion as originally issued, the Fourth Circuit held that a

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[9/] Anderson's analysis concerning when Fourth Amendment rights are clearly established is not dispositive concerning when this First Amendment right is clearly established because the Fourth Amendment right by its nature includes an inquiry into reasonableness that is not present in the First Amendment. "We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." Anderson, 483 U.S. 644.

private employee does have a First Amendment right in this context. 22a. However, the court then amended its opinion to delete this holding. 27a-28a. Even though the Fourth Circuit is incorrect that the right is not clearly established, the effect of its amended opinion will be that in the future, officials who could not claim before the opinion was issued that they reasonably could not have known that the First Amendment prohibits retaliation against private individuals will now be entitled to immunity from suit for such actions. Even if the Fourth Circuit were correct about the law's uncertainty, without any ruling on the substantive right the alleged uncertainty of the law is never resolved and the only precedent established is the perpetual viability of

the qualified immunity defense.[10/] Thus, the effect of the Fourth Circuit's opinion is to deny a remedy not only to petitioner but also to those who come after him; it immunizes future constitutional violations that were prohibited in the past.

## CONCLUSION

This case presents important and unsettled issues concerning the protection of the First Amendment and the applicability of the qualified immunity defense. The result reached by the

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10/ Although the contours of constitutional rights could theoretically be spelled out in actions for equitable relief, in practice this is unlikely to happen because of the many barriers to such relief. "[A]ction[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." Anderson v. Creighton, 483 U.S. at 638 quoting Harlow v. Fitzgerald, 457 U.S. at 814.

Fourth Circuit, if left standing, will seriously undermine the constitutional interest in free and unhindered debate on matters going to the core of self-government. For all of these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: April 15, 1991

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

| | | |
|---|---|---|
| Lawrence J. Korb, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | |
| | ) | |
| v. | ) | No. 88-1746 |
| | ) | |
| John F.Lehman, Jr., et al., | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

STAKER, District Judge:

The appellant, Dr. Lawrence J. Korb, appeals from the dismissal of his Bivens claim[1/] against the appellees, John F. Lehman, Melvyn Paisley, and Everett Pyatt, which sought compensatory and punitive damages for the alleged violation of his First Amendment rights. For the reasons set forth below, we affirm.

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1/ Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

I.

Dr. Korb served as President Reagan's Assistant Secretary of Defense (Manpower, Installations and Logistics) from 1981 to 1985. After he resigned his Defense Department position in September of 1985, Korb was hired by Raytheon Corporation as Vice President in charge of the Washington, D.C., office. In that position, Korb was responsible for Raytheon's relations with Congress and various government departments, including the Department of Defense.

Despite his reputation as a champion of President Reagan's arms build-up policy, Korb joined the Committee for National Security (CNS), a group of private citizens organized to encourage informed debate about national security issues. The group, which includes former

Defense Department officials and military officers, publishes an annual alternative defense budget that is largely critical of the amount of monies spent on national defense. Korb's CNS membership was approved by Raytheon.

In February of 1986, Korb spoke at a news conference to announce the publication of CNS' alternative defense budget. At that conference, the events of which were chronicled in local newscasts and a Washington Post news article, Korb called for a reordering of priorities and suggested a $200 billion reduction in defense spending over a period of five years to be accomplished, in part, by scaling back a planned 600-ship, 15-carrier Navy fleet. This planned Navy build-up was strongly supported by the Secretary of the Navy, John Lehman. The Washington Post article, entitled

Washington Post article, entitled "Pentagon Ex-Defender Turns Critic"[2/] identified Korb as "a private citizen working for arms-maker Raytheon Co."

Reports of the press conference soon reached both the Department of Defense and Raytheon. Upon reading the Washington Post article, Secretary Lehman met with members of his staff and expressed his indignation about Korb's remarks and his belief that a company under contract to the Navy might be advancing programs that would seriously impair national defense. However, Lehman made no representation that he would seek retribution against either Korb or Raytheon, and at no time during the meeting did he encourage his subordinates to pursue the matter with Korb's superiors. Meanwhile, at Raytheon,

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2/ Washington Post, Pg. A17, Col. 2, Wednesday, Feb. 26, 1986.

activities. Several executives felt that the statements attributed to Korb were not appropriate for a Raytheon employee and that the company would be inexorably associated with the well-publicized views of Korb.

Shortly after the conclusion of Secretary Lehman's meeting, two staff members who were in attendance, Melvyn R. Paisley, Assistant Secretary of the Navy (Research, Engineering and Systems), and Everett Pyatt, Assistant Secretary of the Navy (Shipbuilding and Logistics), called Raytheon executives to voice their displeasure with Korb's statements. Paisley, believing Korb's position to be contrary to that taken by Raytheon in earlier meetings with Navy officials, called R. Gene Shelley, a senior vice president of Raytheon and well-known business associate. During that call,

Paisley was frank in his criticism of Korb, averring that a Raytheon official ought to be careful about talking in a public forum because of the possibility of inaccurate reporting. At no time during the conversation did Paisley suggest that Raytheon take any punitive action against Korb. In fact, in a follow-up letter dated March 19, 1986, Paisely communicated to Shelley his belief that the entire matter had been resolved to his satisfaction.

Also on February 26, 1986, Pyatt called Dennis Picard, senior vice president and general manager of Raytheon's missile division. During that conversation, Pyatt expressed his dismay about the positions attributed to Korb -- in particular, the claim that $200 billion could be cut from defense spending over the next five years and the

contention that the Navy's commitment to build and staff 600 ships could be abandoned, without affecting the security of the United States. Pyatt also informed Picard that the Navy is not permitted to absorb a contractor's lobbying expenses as reimbursable costs, and that, through the payment of general overhead accounts, the Navy was, in effect, contributing to a portion of Korb's Raytheon salary. Pyatt did not demand, request, or suggest that Raytheon take any personnel action regarding Korb. Nor does the record before us reflect that Pyatt attempted to intimidate, coerce, or threaten Picard or Raytheon in any way.

During subsequent interviews conducted during an investigation into this matter, both Picard and Shelly indicated that they did not consider the telephone calls

to be inappropriate in any way. And, although Secretary Lehman did not ask Paisley or Pyatt to contact Raytheon directly, he did express approval upon learning that the calls had been made.

Picard and Shelly both contacted Korb's principal supervisor, Philip Phalon, to express their own dissatisfaction with Korb's news conference and to report on the Navy's reaction. Phalon was the individual principally responsible for the hiring of Korb. In the months preceding the news conference, both he and several other high-ranking Raytheon officials had become increasingly dissatisfied with the way in which Korb performed his job. Specifically, Phalon took exception to Korb's regular absence from the office, the result of speaking engagements around the country. Further, Phalon was angered

by a network evening news program on which Korb appeared making comments that were critical of the then unannounced federal defense budget. That particular interview was taped in Raytheon's Washington, D.C., office.

Concluding that Korb was not the right man for the job, Phalon made an initial determination to terminate him. Admittedly, the calls from the Navy were a factor considered by Phalon in making such a decision. However, those calls were not determinative. Phalon described the events leading to Korb's demise as follows: "Dr. Korb's departure from [Raytheon was] part of a continuum. It was not triggered by Navy calls. Nor [were such calls] a decisive moment in time for Dr. [Korb] and his relationship with Raytheon Company." This sentiment was echoed by J. Brainard Holmes, then

president of Raytheon, who testified he too was generally dissatisfied with the manner in which Korb performed his job.

Although Secretary Lehman was frank in his comments about Korb's actions, stating that he "had every hope Raytheon would tell [Korb] to shut up and stop testifying against its principal customer," upon hearing of Korb's impending termination, Lehman called Holmes to reiterate that the Navy could continue to work with Korb and to urge Holmes to reconsider the decision to dismiss Korb. Holmes assured Lehman that Raytheon would take the Secretary's views into consideration, but that a decision based upon Korb's entire employment record would be made.

Ultimately, against the articulated wishes of Lehman, Paisley and Pyatt, Raytheon decided to offer Korb another

position in Philadelphia, which he declined to accept. Shortly thereafter, at the request of Congress, the Department of Defense conducted an investigation into the affair headed by Special Inquiries Investigator Lieutenant Colonel R.P. Jones, USAF. At the conclusion of the investigation, Jones reported that there was no evidence to suggest that Navy officials either requested or intended that Korb be fired. Further, according to the report, Korb's departure from Raytheon was not solely attributable to the complaints by Paisley and Pyatt, but rather to a combination of factors that included the complaints of the Navy officials, as well as complaints from a staff member of the Senate Armed Services Committee, Carl M. Smith, and other Raytheon executives.

II.

In dismissing this action prior to trial, Fed.R.Civ.P. 12(b)(6), the district court relied on alternative grounds. The court held that "when the defendants' alleged conduct is judged 'in light of pre-existing law,' what is 'apparent' is that the conduct was entirely appropriate and lawful." Anderson v. Creighton, 483 U.S. 635 (1987). It decided, therefore, that "plaintiff's allegations fail to state a claim of violation of clearly-established law and defendants are . . . protected by qualified immunity." Mitchell v. Forsyth, 472 U.S. 511 (1987). Alternatively, the court held that "[a] plaintiff seeking damages for a constitutional tort must prove causation in fact, Beard v. O'Neal, 728 F.2d 894,

898 (7th Cir. 1984), cert. denied, 469 U.S. 825 (1984), and government officials may not be held liable where the harm suffered by the plaintiff was 'too remote a consequence' of the official conduct. Martinez v. California, 444 U.S. 277, 285 (1980)."

Because this was a decision based solely on the pleadings and supporting materials, our review of the record before us is de novo, and we are constrained by the standard employed by the district court. Fed.R.Civ.P. 56(c); Pachaly v. City of Lynchburg, 897 F.2d 723 (4th Cir. 1990). We may, however, affirm on any ground fairly supported by the record. Lee v. United States, 809 F.2d 1406, 1408 (9th Cir. 1987). After reviewing the record before us, we believe that the district court correctly dismissed Korb's cause of action and,

without reaching the issue of causation in fact, affirm on the basis that the appellees were protected by qualified immunity.

III.

In almost any action against a government official involving an alleged deprivation of constitutional rights a court is presented with a threshold question of the defendant's immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know [sic]." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)(citations omitted). This type of immunity is generally referred to as qualified immunity. Id. at 807. Except

for certain specified exceptions, this is the form of immunity applicable to federal executive officials. Id. Qualified immunity not only shields a government official from liability for damages but it will also shield him or her from having to stand trial. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985). Consequently, the question of immunity is independent of the merits of a plaintiff's claim, id. at 527-28, and may be decided in the early stages of litigation, even prior to discovery. See Harlow, 457 U.S. at 818; accord, Turner v. Dammon, 848 F.2d 440, 443 (4th Cir. 1988). This is what the district court did in this case, finding that the appellees were immune from suit because their conduct did not violate clearly established law. District Court's

Memorandum Opinion, Joint Appendix at 205, 212-17.

The central question in determining the issue of qualified immunity is whether or not the conduct of the government official violated "clearly established law," i.e., the "'objective legal reasonableness' of [his] action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken. . . ." Anderson v. Creighton, 483 U.S. 635, 639, (1987)(citations omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. at 640 (citations omitted). "[U]nder [this] test, an

official may be entitled to immunity from suit even where he has violated a plaintiff's rights -- if [those rights] were not then 'clearly established' or if a 'reasonable person' in the official's position could have failed to appreciate that his conduct would violate them." Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990) (per curiam)(Judge Phillips concurring)(citation omitted). A court, in making the determination as to whether a constitutional right has been violated, should not look at the right at its most general level but at "its application to the particular conduct being challenged." Id. (citation omitted); Anderson, 483 U.S. at 639-40. If there exists a "legitimate question" as to whether particular conduct violates a particular right then the right is not clearly established and qualified immunity

applies. See Tarantino v. Baker, 825 F.2d 772, 775 (4th Cir. 1987).

The conduct being challenged herein is the appellees' contact with officials of Korb's employer in order to express their displeasure with and criticism of Korb for his public critical comments regarding the proposed Department of Defense budget and allegedly to cause his employer to fire him for making such comments. Korb contends that this conduct violated his First Amendment right of free speech. The district court found that the appellees were entitled to qualified immunity because no statute or agency rule or regulation prohibited the conduct alleged. Furthermore, case law, Donohoe v. Watt, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983), had held that high-level government officials had the right to

communicate to entities doing business with their department adverse comments concerning the entitites' representatives. Id. at 756. Thus, the unlawfulness of the appellees' conduct was not clearly established. Joint Appendix at 216-17.

The protection of citizens' right to speak publicly on matters of public concern, such as the nation's defense budget, is at the very heart of the First Amendment. First National Bank v. Bellotti, 435 U.S. 765, 776 (1978). On such matters "free and open debate is vital to informed decision making. . . ." Pickering v. Board of Education, 391 U.S. 563, 571-72 (1968). The Supreme Court has said that it is essential to protect the rights of persons having special knowledge or expertise to speak on an issue of public concern. Id. at 572.

"'[S]tatements criticizing public policy and the implementation of it must be similarly protected.'" Rankin v. McPherson, 483 U.S. 378, 387 (1987)(citations omitted). It is for this reason that the Supreme Court has held that government officials may not retaliate against public employees for speaking on matters of public concern. E.g., id.; Pickering, supra. We see no reason why the same protection should not extend to employees of private entities.

"[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . . " Greene v. McElroy, 360 U.S. 474, 492 (1959). The actions of government officials which cause a private employee to be deprived

of his employment give rise to a Bivens-type action against those officials for violation of due process. Merritt v. Mackey, 827 F.2d 1368, 1371 (9th Cir. 1987). We believe a Bivens action should also exist when government officials cause a private employee to be fired by his private employer for exercising his First Amendment right to speak out on matters of public concern. Cf. Reuber v. United States, 750 F.2d 1039, 1054-59 (D.C. Cir. 1985)(private employee has Bivens-type cause of action against his employer -- a government contractor -- for violation of First Amendment rights when disciplinary action taken against plaintiff at behest of and in conjunction with government officials). Government officials may "offer adverse commentary upon the integrity, competence, judgment, or discretion," Donohoe, 546 F. Supp. at

756, of a private employee. We deem it to be the law that such officials may not seek to retaliate against a private employee through his private employer solely for his exercising his First Amendment rights; however, such was not clearly established to have been the law when appellees committed the acts of which Korb complained.

Of course, a plaintiff would have to show that his employer's actions were the result of the exercise of coercive power or direct or indirect significant encouragement by the government officials. See Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Reuber, 750 F.2d at 1057-58 & 1063 (Judge Bork concurring). Furthermore, a court should consider those factors applicable to cases involving public employees, Piver v. Pender County Bd. of Educ., 835 F.2d

1076, 1081 (4th Cir. 1987), cert. denied, 487 U.S. 1206 (1988), in determining whether the speech in question involved matters of public concern.

Given what we have just said, what is clear is that at the time the conduct alleged in the complaint occurred, there was no law declaring that such conduct might give rise to a constitutional violation. In fact, the contrary was indicated. Donohoe, supra. The district court, therefore, was correct in finding that the appellees did not violate "clearly established" law and were thus protected from suit by qualified immunity. The judgment of the district court in dismissing this action is

AFFIRMED.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent, feeling that the defendants are not entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800, and Anderson v. Creighton, 483 U.S. 635.

Filed: December 6, 1990

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 88-1746
(CA-88-207-A)

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Lawrence J. Korb,

Plaintiff - Appellant,

versus

John F. Lehman, Jr., Et al,

Defendants - Appellees.

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O R D E R

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The Court amends its opinion filed

November 26, 1990, as follows:

On page 9, second full paragraph, line 7 -- the word "know" is corrected to read "known."

For the Court - By Direction

/s/ John M. Greacen

CLERK

Filed: January 9, 1991

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 88-1746
(CA-88-207-A)

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Lawrence J. Korb,

Plaintiff - Appellant,

versus

John F. Lehman, Jr., et al,

Defendants - Appellees.

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O R D E R

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The Court further amends its opinion filed November 26, 1990, as amended by order filed December 6, 1990, as follows:

On page 13, first paragraph, line 7 -- The sentence beginning "We deem it to be

the law" is amended to begin "Even if it ought to be the law."

On page 13, first full paragraph -- the whole paragraph beginning "Of course, a plaintiff" is deleted.

For the Court - By Direction

/s/ John M. Greacen

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

| | | |
|---|---|---|
| LAWRENCE J. KORB, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIVIL |
| | ) | ACTION NO. |
| JOHN F. LEHMAN, et al., | ) | 88-0207-A |
| | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION

This matter came before the Court upon defendants John F. Lehman, Jr., Melvyn R. Paisley, Everett Pyatt, and Carl M. Smith's motion to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

Plaintiff Lawrence J. Korb seeks compensatory and punitive damages against

defendants Lehman, Paisley, Pyatt, and Smith. Lehman, Paisley, and Pyatt are present or former high-ranking Navy officials who are alleged to have caused Dr. Korb's termination in 1986 from his position as vice-president of Raytheon Company. Defendant Smith, a staff member of the Senate Armed Services Committee, is also alleged to have caused Korb's termination. Raytheon is a major contractor with various agencies of the United States Department of Defense, including the United States Navy. At the time of the events that gave rise to this dispute, defendant Lehman was Secretary of the Navy, and defendants Paisley and Pyatt were Assistant Secretaries of the Navy. Defendant Smith was a staff member of the Senate Armed Services Committee. All of the defendants are alleged to have made telephone calls to Dr. Korb's

superiors complaining about plaintiff's statements at a news conference concerning defense policy.

After four years as the Assistant Secretary of Defense (Manpower, Installations and Logistics), plaintiff went to work for Raytheon in September 1985. As vice president in charge of Raytheon's Washington, D.C. area office, plaintiff was responsible for Raytheon's relations with Congress and the Department of Defense.

On February 25, 1986, Dr. Korb, as a member of an organization called the Committee for National Security ("CNS"), participated in a news conference to announce the publication of CNS' "alternative defense budget." An article appeared in the next morning's Washington Post, describing CNS as advocating a $200 billion reduction in the President's

defense budget, and quoting Dr. Korb as criticizing the administration's plan to build a 600-ship Navy. The article, headlined "Pentagon Ex-Defender Turns Critic," identified Dr. Korb as "a private citizen working for arms maker Raytheon Co.," speaking "as a member of the Committee on National Security."

Upon learning of Dr. Korb's remarks from news accounts, and prior to any comments from the Navy or others outside Raytheon, several Raytheon executives became upset. They felt that Dr. Korb's statements were not appropriate for a Raytheon executive and that, by virtue of Dr. Korb's status as an officer of the company, Raytheon would inevitably be associated with Dr. Korb's views.

Defendants also became aware of Dr. Korb's remarks through the next day's press accounts of the news conference.

Secretary Lehman raised the issue at his morning staff meeting, expressing indignation that one of the Navy's contractors would be advancing programs that he believed would seriously impair national defense. His comments were addressed to the meeting generally, and not to anyone in particular.

Assistant Secretaries Paisley and Pyatt attended that meeting. When Mr. Paisley learned of Dr. Korb's remarks, he felt they were "inappropriate." He had attended meetings with Raytheon officials who had supported the President's defense spending policies, Paisley now doubted their credibility and felt he had been deceived. Shortly after the meeting, Mr. Paisley on his own initiative called a senior vice president of Raytheon, R. Gene Shelley, with whom Mr. Paisley had frequently worked in the past. Mr.

Paisley knew of no statute or regulation that barred him from calling defense contractors concerning positions being taken by their personnel, and it was not unusual for Mr. Paisley to call Mr. Shelley.

Assistant Secretary Paisley told Mr. Shelley that he was troubled by the statements attributed to Korb in the Washington Post article, and expressed his view that a Raytheon official ought to be careful about talking in a public forum because of the possibility of inaccurate reporting. Mr. Paisley did not ask Mr. Shelley to silence Dr. Korb or to take any action against plaintiff. Mr. Shelley did not view the call as an invitation to take any action against Dr. Korb or have the sense that Mr. Paisley implicitly expected some action to be taken. Mr. Shelley considered the phone

call "a minor flap," not relevant to whether Raytheon won or lost defense contracts.

On the same day, Assistant Secretary Pyatt, acting on his own initiative, called Dennis Picard, who is Raytheon's senior vice president and general manager of the Missile Systems Division. Mr. Pyatt told Mr. Picard that he disagreed with and was unhappy about the positions attributed to Korb; particularly, the claim that $200 billion could be cut from planned defense spending during the next five years, and the contention that the Navy's commitment to build and man 600 ships could be abandoned, without adversely affecting the security of the United States.

Mr. Pyatt did not demand, request or suggest that Raytheon take any personnel action regarding Dr. Korb. Nor did Mr.

Pyatt attempt to intimidate, coerce, or threaten Mr. Picard or Raytheon in any way. Mr. Picard did not consider Pyatt's call to be inappropriate in any respect.

Secretary Lehman did not ask Mr. Paisley or Mr. Pyatt to make these contacts. When he learned of the phone calls after-the-fact, Secretary Lehman expressed approval that the calls had been made.

Mr. Picard and Mr. Shelley called Dr. Korb's principal supervisor, Philip Phalon, to express their own dissatisfaction with Dr. Korb's news conference and to report the Navy's reaction to Dr. Korb's public statements. Mr. Phalon's Raytheon colleagues did not tell him that the Navy callers had asked Raytheon to silence or terminate Dr. Korb, or that the Navy had somehow threatened, coerced, or intimidated them.

Mr. Phalon did not receive any calls directly from Navy officials immediately following news coverage of Dr. Korb's press conference.

Mr. Phalon was the individual principally responsible for hiring Dr. Korb. During the six months between the date that plaintiff was hired and the news conference, Mr. Phalon and other Raytheon executives had become displeased with Dr. Korb's job performance. In fact, Mr. Picard had concluded that Dr. Korb was not the "right man for the job." Mr. Phalon was concerned that plaintiff was frequently absent from the Washington office because of his extensive speaking schedule, and felt that plaintiff's frequent appearances in the press were inconsistent with his duties at Raytheon. Mr. Phalon also became upset when he viewed Dr. Korb on a network evening news

program, in an interview that was taped in Raytheon's Washington office, making comments that were critical of the yet-to-be announced federal defense budget. He decided then to consider changing Dr. Korb's assignment.

Sometime between February 26 and mid-March 1986, Mr. Phalon, after consulting with others at Raytheon, made an initial decision to terminate Dr. Korb. While the calls to Raytheon complaining of Dr. Korb's press statements were considered by Mr. Phalon, they did not cause his decision to remove Dr. Korb as head of the Washington office. Rather, "Dr. Korb's departure from [Raytheon] was part of a continuum," according to Mr. Phalon, and the calls from the Navy "were not even a decisive moment in time" for Dr. Korb's relationship with Raytheon.

In mid-March, Secretary Lehman called D. Brainerd Holmes, who was then president of Raytheon. Secretary Lehman had heard reports that Dr. Korb was going to be terminated, and called to urge that this not be done. Secretary Lehman assured Mr. Holmes that the Navy could work with Dr. Korb and asked Mr. Holmes if Raytheon would reconsider its decision to terminate him. Secretary Lehman did not suggest or ask that Raytheon take any action against Dr. Korb, nor did he make any express or implied threats or statements that could be considered intimidating or coercive. Mr. Holmes said the company would take Secretary Lehman's views into consideration, but would make a decision about Dr. Korb independent of his relations with the Navy.

On March 7, Assistant Secretary Pyatt met with Mr. Phalon. Mr. Phalon was assessing whether Dr. Korb should be removed from his position as Washington Vice President for Raytheon, and sought Mr. Pyatt's views. Mr. Pyatt responded that the matter was solely for Raytheon to decide. Mr. Pyatt stressed that the Navy was fully prepared to work with Dr. Korb in the future, if Raytheon should decide against making a change. Assistant Secretary Pyatt reiterated these views in a letter to Mr. Phalon dated March 19. Assistant Secretary Paisley also wrote a letter at this time to his contact at Raytheon, urging that Dr. Korb be retained in some capacity by the company.

Eventually, the company decided to offer Dr. Korb another position, which he declined to accept. Nonetheless, Dr. Korb

was kept on Raytheon's payroll until at least September 1986, long after he had ceased performing any services for the company.

The Supreme Court has held that government officials will not be held liable for the actions of private parties where the officials did not cause the conduct of which plaintiff complains. Constitutional standards are invoked only when the state is responsible for the specific conduct. Blum v. Yaretsky, 457 U.S. 991 (1982); Carter v. Norfolk Community Hospital Ass'n, 761 F.2d 970 (4th Cir. 1985). Government officials should be held accountable for private conduct only when they exercise something approaching coercive power over the decision making processes of the private entity. Blum, 457 U.S. at 1004.

Even taking all of plaintiff's allegations as true, the Amended Complaint does not allege that the defendants exercised coercive power. Plaintiff does not and cannot allege that defendants controlled Raytheon's personnel decisions or compelled Dr. Korb's reassignment or termination. Even if the "stimulus" to fire and employee "originates with the government, a private individual's independent conduct based on information supplied to him by a government official cannot be characterized as state-action." Donohoe v. Watt, 546 F. Supp. 753, 757 (D.D.C. 1982), aff'd, 713 F.2d 864 (D.C. Cir. 1983). Thus, the essential element of government action is missing from plaintiff's allegations. Where there is no state action, there can be no

constitutional cause of action for damages upon which relief can be granted.

As high-ranking federal officers performing discretionary duties, the Navy defendants enjoy qualified immunity from suit and liability for constitutional torts. Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982); Donohoe, 546 F. Supp. 753. The qualified immunity doctrine "is intended to allow public officials to act 'with independence and without fear of consequences' where their actions do not implicate clearly established law." Turner v. Dammon, No. 86-3628, slip op. at 5-6 (4th Cir. May 3, 1988, as amended May 17, 1988, as amended May 31, 1988) (quoting Harlow, 457 U.S. at 819).

Plaintiff alleges, in essence, that defendants made statements in response to his public comments about defendants' policies that provoked a private

corporation to fire him. Plaintiff does not allege that Secretary Lehman directed Assistant Secretaries Paisley and Pyatt to call Raytheon officials, or that he told them what to say in those phone calls. Plaintiff alleges, based on information and belief, that Mr. Pyatt said he would "stop assisting Raytheon with certain defense contracts" but does not allege that Pyatt conditioned any such "assistance" on Raytheon's taking personnel action against Dr. Korb. Indeed, there is no allegation whatever that any of the defendants asked Raytheon to terminate Dr. Korb. As to Raytheon's decision to terminate Dr. Korb, the complaint alleges only that the decision was a "direct and immediate reaction" to calls from Navy officials. It does not allege that defendants caused or compelled Raytheon to reassign Dr. Korb,

or that the decision was other than that of an independent, private actor.

Dr. Korb's complaint fails to state a claim against the Navy defendants from which they would not be immune. Applying the Harlow analysis, the Court must first determine whether defendants were carrying out a discretionary function within the scope of their official duties when they contacted Raytheon. Harlow, 457 U.S. at 816. The Amended Complaint alone establishes that the Navy defendants were carrying out official, discretionary functions when they expressed their disagreement with Dr. Korb's public statements regarding defense and Navy policy. The complaint asserts that defendants were serving as Secretary and Assistant Secretaries of the Navy, that the telephone calls from the three defendants to Raytheon were

made from defendants' offices, that defendant Pyatt wrote a letter to Raytheon on official Navy stationary mailed from the Pentagon, and that the Navy defendants acted "under color of their authority as Navy officials...."

More to the point, the Supreme Court has defined the performance of discretionary duties as the exercise of "independent judgment," Westfall v. Erwin, ___ U.S. ___, 108 S.Ct. 580, 584 (1988), turning on "the decisionmakers' experiences, values, and emotions." Harlow, 457 U.S. at 816. Based on this definition, defendants clearly were acting within bounds of their discretionary duties when they communicated with a company having business with the government about matters bearing on the "integrity, competence, judgment, or discretion" of

one of the company's representatives. Donohoe, 546 F. Supp. at 756.

The statutory duties of the Secretary of the Navy, which he in turn may delegate to Assistant Secretaries pursuant to 10 U.S.C.A. § 5016 (West. Supp. 1988), include the functions of supplying and equipping the Department, and the construction, outfitting, and repair of military equipment. 10 U.S.C.A. § 5013 (West Supp. 1988). Thus, as high-ranking Navy officials, their official duties included keeping in contact with major Navy defense contractors concerning all matters affecting the relationship between contracting parties. Dr. Korb's statements were not about public issues that were wholly irrelevant to these official duties, but rather, directly implicated the Navy budget and

procurement program, matters at the core of the Secretary's and Assistant Secretaries' functions. Furthermore, defendants believed Dr. Korb's assertions were erroneous and harmful to the national defense. As part of their responsibilities, they were required to exercise discretion to determine whether and how to react to such public statements. In sum, the defendants' conduct fell within the ambit of their discretionary official functions.

The court must next consider whether defendants reasonably could have believed that their alleged conduct was consistent with Dr. Korb's first amendment rights. Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1987). In making this assessment, the court is not to rely on plaintiff's generalized assertion that the right to speak freely on defense

policy is self-evident. Rather, the inquiry focuses on whether the impropriety of defendants' conduct was apparent "in light of preexisting law." Anderson, 107 S.Ct. at 3039. Defendants cannot be charged with a violation of clearly established law where the legal precedents are "unsettled and fact-specific [in] nature." Tarantino v. Baker, 825 F.2d 772, 779 (4th Cir. 1987). Instead, "the contours of [plaintiff's] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 107 S.Ct. at 3039. Judged in this light, plaintiff fails to allege a violation of clearly established law.

Plaintiff cites no statute or regulation in effect at the time that made it improper for Secretary Lehman to criticize Dr. Korb at a staff meeting, or

for the other defendants to express their opinions to a defense contractor about the views or conduct of one of the contractor's employees. Similarly, no policy or other internal directive of the Navy or DOD barred or circumscribed defendants' discretion in this regard. In fact, the 1982 Donohoe case had held that conduct like that engaged in by defendants did not violate clearly established rights. Donohoe, 546 F. Supp. 753.

Thus, when defendants' alleged conduct is judged "in light of pre-existing law," what is "apparent" is that the conduct was entirely appropriate and lawful. Anderson, 107 S.Ct. 3034. The plaintiff's allegations fail to state a claim of violation of clearly established law, and defendants are therefore

protected by qualified immunity. Mitchell v. Forsyth, 472 U.S. 511 (1987).

The record further demonstrates that their conduct was not the proximate cause of Dr. Korb's injury. Assistant Secretaries Paisley and Pyatt did not expressly or implicitly ask that Dr. Korb be silenced or terminated when they telephoned their contracts [sic] at Raytheon. They did not make statements that were expressly or implicitly threatening, and the Raytheon officials did not perceive their calls to be coercive or intimidating. Furthermore, Secretary Lehman neither directed his assistant secretaries to make those calls, nor told them what to say.

The Raytheon official responsible for Dr. Korb's termination, Philip Phalon, did not communicate with anyone from the Navy immediately following Dr. Korb's

news conference. He stated that Raytheon's decision was based on building dissatisfaction with Dr. Korb's job performance and on Raytheon's independent judgment that his continuing employment as head of the Washington office was not in the company's best interests. At most, the record shows that the Navy's negative reaction to Dr. Korb's news conference was just one of the factors taken into account, but not the determinative factor in his decision.

A plaintiff seeking damages for a constitutional tort must prove causation in fact, Beard v. O'Neal, 728 F.2d 894, 898 (7th Cir. 1984), cert. denied, 469 U.S. 825 (1984), and government officials may not be held liable where the harm suffered by plaintiff was "too remote a consequence" of the official conduct.

Martinez v. California, 444 U.S. 277, 285 (1980).

In sum, there is no evidence that defendants threatened or coerced Raytheon to induce the company to silence or remove Dr. Korb, and no causal link between defendants' conduct and plaintiff's termination.

The allegations against defendant Smith are essentially that he, too, made phone calls to Raytheon which caused plaintiff's termination. As with the complaint against the three Navy defendants, there is no causal connection between his actions and those of Raytheon, and he is also entitled to immunity.

Plaintiff has also asserted a claim against defendant Smith alleging that Smith interfered with plaintiff's employment relationship with Raytheon.

However, the complaint does not allege an agreement between Smith and Raytheon for a fixed term of employment, and in the absence of such an agreement, employment is terminable at will, provided no improper methods were used. The amended complaint fails to state a claim for interference with employment relations. Duggin v. Adams, 234 Va. 221, 226-27, 360 S.E.2d 832, 836 (1987); Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396, 402, 337 S.E. 2d 744, 748 (1985).

The defendants' motion to dismiss and for summary judgment should be granted and an appropriate order shall issue.

/s/

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

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| LAWRENCE J. KORB, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | CIVIL ACTION NO. |
| | ) | 88-0207-A |
| JOHN F. LEHMAN, et al., | ) | |
| | ) | |
| Defendants, | ) | |

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that this case is DISMISSED as to all defendants.

/s/

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 19, 1988

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

| | | |
|---|---|---|
| LAWRENCE J. KORB,<br>3256 Niagara Square<br>Pittsburgh, Pennsylvania<br><br>Plaintiff,<br><br>v.<br><br>JOHN F. LEHMAN, JR.,<br>1112 Waverly Way<br>McLean, Virginia 22101;<br><br>EVERETT PYATT<br>4560 25th Road<br>North Arlington, Virginia 22207;<br><br>MELVYN R. PAISLEY,<br>6516 Ridge Street<br>McLean, Virginia 22101; and<br><br>CARL M. SMITH<br>213 So. Lee Street<br>Alexandria, Virginia 22314<br><br>Defendants. | ) | Civil Action No 88-0207-A |

AMENDED COMPLAINT

1. This is a civil action for monetary damages arising under the First Amendment to the Constitution of the United States and the common law.

2. This Court has jurisdiction over this action under 28 U.S.C. § 1331 and the doctrine of pendent jurisdiction. Venue is proper under 28 U.S.C. § 1391(b).

3. Plaintiff Lawrence J. Korb ("Dr. Korb") served as the Assistant Secretary of Defense (Manpower, Installations and Logistics) in the United States Department of Defense from 1981 to 1985. He resigned from this position and was hired in September, 1985, by Raytheon Corporation, a manufacturer of weapons systems and a major defense contractor for the United States Department of Defense. Dr. Korb served as Vice President in charge of Raytheon's

"Washington, D.C." office located in Arlington, Virginia, and was responsible for Congressional relations and liaison with various government departments, including the Department of Defense.

4. Defendant John F. Lehman, Jr., served in 1986 and at all times material hereto as Secretary of the Navy.

5. Defendant Everett Pyatt served in 1986 and at all times material hereto as Assistant Secretary of the Navy (Shipbuilding and Logistics).

6. Defendant Melvyn R. Paisley served in 1986 and at all times material hereto as Assistant Secretary of the Navy (Research, Engineering and Systems).

7. Defendant Carl M. Smith was in 1986 and at all times material hereto a Senate Armed Services Committee staff member whose duties included oversight of the missile budget.

8. In or about December, 1985, Dr. Korb, in his private capacity, but with the permission of Raytheon, joined the Committee for National Security (CNS), a Washington-based nonprofit, bipartisan organization whose members include former Defense Department officials and military officers. The goal of CNS is to encourage informed public debate on national security issues and to expand the constituency for policies and programs designed to advance national security while reducing the risk of nuclear war. For some years, CNS has published an annual alternative defense budget as one of its educational activities.

9. On February 25, 1986, CNS held a press conference to announce the publication of its alternative defense budget. As a member of CNS, Dr. Korb

endorsed the alternative budget and participated with other CNS members in describing it to the press. The following day the CNS press conference was reported in The Washington Post, and Dr. Korb's role as a former Defense official who was now critical of defense spending was prominently featured. The Post article also stated that during the press conference Dr. Korb had urged a scaling back of the planned 600 ship, 15 carrier-group Navy that was supported by defendant Lehman, then Secretary of the Navy.

10. After reading the newspaper account of the CNS press conference, Secretary Lehman met with his staff at the Pentagon and informed them that he strongly objected to the fact that Dr. Korb had criticized the Administration's defense policies. With the approval of

Secretary Lehman, that same day Assistant Secretary Pyatt and Assistant Secretary Paisley, each telephoned high-ranking Raytheon executives, including Senior Vice President and President-elect R.G. Shelley, and Dennis J. Picard, chief of the missile division, in order to express their anger at Dr. Korb's statements at the CNS press conference.

11. Defendants Pyatt and Paisley made these calls from their offices in the Pentagon or in Arlington. They warned that Raytheon's future business dealings with the Pentagon could be harmed by Dr. Korb's presence, and demanded that Raytheon prevent Dr. Korb from criticizing the Administration's proposed defense budget. On information and belief, defendant Pyatt also told Mr. Picard that he would stop assisting Raytheon with certain defense contracts.

12. At about the same time as the Pyatt and Paisley calls, defendant Smith also called senior Raytheon executives to complain about Dr. Korb's public criticism of the proposed Defense budget. On information and belief defendant Smith told them that unless Raytheon silenced or removed Dr. Korb, he would no longer meet with anyone from Raytheon's Washington office.

13. In direct and immediate reaction to the angry complaints and explicit and implicit threats by defendants, Raytheon terminated Dr. Korb from his position. Dr. Korb was told that Raytheon would keep him on the payroll until August 31, 1986, with the title "special advisor" in the Washington office.

14. After defendants Lehman, Pyatt, and Paisley (the "Navy Defendants") learned that Dr. Korb had been fired in

response to their telephone calls, they again contacted Raytheon. They reiterated that they wanted Dr. Korb silenced but suggested that Raytheon do so by means other than by outrightly dismissing him.

15. Specifically, on March 19, 1986, defendant Pyatt wrote to Raytheon Vice President for Corporate Marketing Philip A. Phalon, on official Navy stationery, mailed from the Pentagon, that "[t]he Navy objects strongly to officers of our contractors whose salaries are paid in part by Department of Defense, speaking as company officers, attacking President Reagan's Defense program."

16. In addition, on or about March 25, 1986, defendant Lehman personally telephoned Raytheon president D. Brainerd Holmes from his office in the Pentagon

and advised Raytheon to transfer Dr. Korb to another job, out of town.

17. In defending the aforementioned communications about Dr. Korb to Raytheon, defendant Lehman has publicly stated, "I had every hope Raytheon would tell him to shut up and stop testifying against its principal customer."

18. On or about March 27, 1986, in response to defendant Lehman's suggestion to Raytheon president Holmes, Raytheon offered Dr. Korb, as an alternative to dismissal from the company, the option of being assigned as a commercial marketing consultant to a Raytheon subsidiary in Philadelphia, Pennsylvania. In this capacity Dr. Korb's duties would no longer have included dealing with the Department of Defense.

19. The alternative position which Dr. Korb was offered by Raytheon was not

commensurate with the position for which he had been hired with respect to his responsibilities, status, tenure, salary and benefits. Under the circumstances, such a transfer and demotion would also have been personally humiliating for Dr. Korb and would have effectively prevented him from speaking out on important matters of national public concern. For these reasons, Dr. Korb refused to accept this alternative position, and Raytheon accordingly terminated him.

20. The Office of the Inspector General of the Department of Defense conducted an investigation into the propriety and impact of the actions taken by the Navy Defendants against Dr. Korb. The Report of Investigation, dated October 28, 1986, concluded that these "Navy officials acted improperly in that they complained to Raytheon with the

intention of restricting Dr. Korb from making public statements that were contrary to Department of the Navy and the DoD positions....

The Navy officials demonstrated a lack of sensitivity to the right of persons to speak out on public issues and to the responsibility of Government officials not to abuse their office by impinging on those rights.... The fundamental concept that Defense officials do not impinge on the right of private persons, including executives of Defense contractors, from expressing their opinions on matters of public policy, is ... self-evident...."

21. The Inspector General's Report of Investigation also concluded that the Navy Defendants should have recognized at the outset that Raytheon might take adverse action against Dr. Korb as the "natural consequence" of their complaints

to Raytheon about him. The Report found that these complaints, along with defendant Smith's complaint to Raytheon described in paragraph 12 of this Complaint, substantially influenced Raytheon's decision to remove Dr. Korb.

22. The Report of Investigation recommended, among other things, that the Secretary of Defense "remind" Defense Department officials of the "prohibition" against taking actions to restrict the lawful freedom of speech rights of non-Defense Department personnel. It further recommended that the Secretary of Defense issue disciplinary letters to the defendant Navy officials "concerning the impropriety of their actions and address their continuing belief that contractor executives lose the right to speak out on Defense policy issues if their views differ from those of the Navy."

Count I

(Against All Defendants)

23. Plaintiff incorporates by reference as if fully stated herein all the statements contained in paragraphs 1 through 22 above.

24. By their aforementioned acts, which were committed under color of their authority as Navy officials or as a Senate Armed Services Committee staff member, defendants intended to and did penalize Dr. Korb for exercising the right of free speech guaranteed to him by the First Amendment of the Constitution of the United States, and otherwise intended to and did deprive Dr. Korb of that right. Defendants intended to chill and prevent Dr. Korb from exercising his right of free speech on future occasions and to punish him for having spoken out at the news conference.

25. Defendants knew or should have known that their actions were unlawful under clearly established law.

26. Defendants acted with reckless and callous indifference towards the constitutional rights of Dr. Korb.

27. As a direct and proximate result of the defendants' acts, Dr. Korb has sustained and will continue to sustain substantial monetary losses and has suffered and will continue to suffer mental and emotional pain, anguish and humiliation.

**WHEREFORE**, plaintiff seeks:

(1) Compensatory damages from all defendants in an amount to be determined, but exceeding $500,000;

(2) Punitive damages from all defendants; and

(3) Such other and further relief as this Court may deem appropriate, including interest, costs and reasonable attorney's fees.

Count II

(Against Defendant Smith)

28. Plaintiff incorporates by reference as if fully stated herein all the statements contained in paragraphs 1 through 26 above.

29. Defendant Smith by his aforementioned acts, did wrongfully and improperly interfere with plaintiff's employment relationship with Raytheon.

30. Defendant Smith acted with willful disregard for the rights of Dr. Korb.

31. As a direct and proximate result of defendant Smith's acts, Dr. Korb has sustained and will continue to sustain substantial monetary losses.

**WHEREFORE**, plaintiff seeks:

(1) Compensatory damages from defendant Smith in an amount to be determined, but exceeding $500,000; and

(2) Punitive damages from all defendants; and

(3) Such other and further relief as this Court may deem appropriate, including interest, costs and reasonable attorney's fees.

/s/Kate Martin

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DATED: April 29, 1988